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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Donald Lee Linville,
10 Petitioner,

11 v.

12 Ryan Thornell, *et al.*,
13 Respondents.
14

No. CV-24-00069-PHX-JJT (MTM)

ORDER

15 At issue is the Report and Recommendation (Doc. 11, “R&R”) submitted by United
16 States Magistrate Judge Michael T. Morrissey in this matter recommending that the Court
17 deny and dismiss with prejudice Donald Lee Linville’s (“Petitioner”) Petition for Writ of
18 Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Petitioner timely filed Objections
19 to the R&R (Doc. 12), and Respondents field a Reply to the Objections (Doc. 13).
20 Petitioner thereafter filed a “Response to Reply to the Objection to Report and
21 Recommendation” (Doc. 14), which Respondents have moved to strike (Doc. 15.) The
22 Court will grant Respondents Motion to Strike, overrule the Objections to the R&R, adopt
23 the R&R in whole, and dismiss the Petition with prejudice for the reasons set forth below.

24 In the R&R, Judge Morrissey correctly analyzed each of Petitioner’s grounds
25 stemming from his arguments centering on suppression of evidence seized from the
26 memory card in Petitioner’s camera and the computers in his residence, and the Court
27 agrees with his conclusions that Grounds One and Nine fail to raise cognizable claims at
28 all, and Grounds Five and Six suffer from the same infirmity insofar as they attempt to

1 raise constitutional violations stemming from deficiencies in the state search warrants.¹
2 Ground One asserts error in the state trial court's decision not to suppress the evidence
3 noted above, and Grounds Five and Six assert the infirmities with the warrants as stated
4 above. These claims are flatly precluded. *Stone v. Powell*, 428 U.S. 465, 481-82, 494-95
5 (1976). Arizona provided Petitioner a full and fair opportunity to litigate his Fourth
6 Amendment claim and resultant suppression argument, and he did so, both at the state trial
7 and appellate levels. Habeas review on these basis are precluded per *Stone*. In Ground Nine,
8 Petitioner asserts a cognizable claim lies with the state trial court's decision not to hold an
9 evidentiary hearing on his PCR claims. Even if such decision were error—a conclusion to
10 which this Court does not subscribe—such would be a violation only of state law or rule,
11 but not of federal law, constitutional or otherwise. Grounds One, Five (in part), Six (in part)
12 and Nine are denied as failing to state a cognizable claim.

13 The remaining components of Petitioner's Grounds Five and Six—that his counsel
14 was ineffective in 1) choosing one strategy over another in arguing for suppression of the
15 fruits of the November 6 search warrant; and 2) failing to argue a lack of nexus between
16 the evidence recovered from his camera and justification for both search warrants—fail on
17 their merits. In both grounds, Petitioner cannot show his counsel's performance was
18 deficient within the meaning of the *Strickland* test, nor that he suffered prejudice as a result.
19 Counsel sought before trial to suppress all evidence that the police obtained after they
20 conducted a warrantless search of the memory card in the camera Petitioner placed on
21 B.T.'s balcony. Petitioner's arguments come down to hindsight criticism that counsel
22 should have argued down Avenue A rather than Avenue B, but such is a tactical decision
23 that, as Judge Morrissey correctly noted, falls within prevailing professional norms.

24 Moreover, as Judge Morrissey also noted, Petitioner's arguments fail to demonstrate
25 prejudice, thus failing *Strickland*'s second prong, as he has not shown any other motion or
26 argument for suppression would have succeeded. The state appellate court found “no

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28 ¹ Petitioner also raises in Grounds Five and Six arguments that his trial counsel provided ineffective assistance in counsel's litigation of the suppression motions. The Court addresses those arguments separately *infra*.

1 indication” Petitioner’s proposed alternative strategy for suppression of the search warrant
2 fruits would have succeeded, and that court’s conclusions were based on its reasoning that
3 both search warrants were supported by probable cause even without reliance upon or
4 consideration of any evidence from the camera’s memory card. That determination is not
5 contrary to nor an unreasonable application of the *Strickland* standard. The remaining
6 components of Petitioner’s Grounds Five and Six will be dismissed, as Judge Morrissey’s
7 analysis of them is sound.

8 Judge Morrissey also correctly concluded that Petitioner’s Ground Seven, arguing
9 ineffective assistance under *Strickland* for counsel’s failure to argue for judgment of
10 acquittal based on lack of evidence of the age of the victims in each child exploitation
11 charge, must fail. The record evidence supported a finding of the children’s ages as less
12 than fifteen, as the Arizona appellate court recognized. Any argument to the contrary would
13 have been futile, and it is practically hornbook law that counsel cannot be deemed
14 ineffective for failing to make a meritless claim. *E.g., Gonzalez v. Knowles*, 515 F.3d 1006,
15 1016 (9th Cir. 2008).

16 Turning to Petitioner’s final ineffective assistance claim in Ground Eight, Judge
17 Morrissey correctly concluded that it lacks merit. In *State v. Berger*, 212 Ariz. 473 (2006),
18 the Arizona Supreme Court turned back an Eighth Amendment challenge to the state’s
19 sentencing scheme as set forth in A.R.S. § 13-3553(A)(2)—the scheme by which Petitioner
20 was sentenced in his own case. Petitioner urges that his counsel committed ineffective
21 assistance by failing to argue the unconstitutionality of the statutory sentencing scheme
22 and for overturning *Berger*. The state court rejected this ground in Petitioner’s PCR
23 proceeding, concluding this was a non-meritorious issue, and thus his trial or appellate
24 counsel could not be deemed ineffective for failing to raise it. The state court’s decision
25 was not based on an unreasonable determination of the facts, nor was it contrary to or an
26 unreasonable application of *Strickland*. Ground Eight fails on its merits and the Court will
27 deny it.

28 . . .

1 As to the sufficiency of evidence claims Petitioner makes in Grounds Two, Three
2 and Four, Judge Morrissey's R&R thoroughly treats with the state appellate court's
3 conclusions that the evidence adduced at trial was sufficient to support the jury's findings.
4 The Court will not here recount Judge Morrissey's analysis, found on pages 7 through 13
5 of the R&R as it would serve no purpose to merely repeat, but the Court does adopt that
6 analysis in whole. Grounds Two through Four must be denied.

7 In coming to the above conclusions, the Court has carefully considered Petitioner's
8 17-page Objection. But the objection does not answer any finding or conclusion of the
9 R&R with an explanation of why such finding or conclusion is incorrect. The Objection
10 merely repeats arguments Petitioner made in his Petition briefing, and it recites holdings
11 of caselaw without applying them—it does not point to how such caselaw reveals error in
12 the R&R's reasoning. This is to say there is no specificity to any of the objections Petitioner
13 does make.² Those objections fail.

14 **IT IS THEREFORE ORDERED** overruling Petitioner's Objections to the R&R
15 (Doc. 12).

16 **IT IS FURTHER ORDERED** adopting in whole the R&R submitted by Judge
17 Morrissey (Doc. 11).

18 **IT IS FURTHER ORDERED** denying and dismissing with prejudice the Petition
19 for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). The Clerk of Court shall
20 terminate this matter.

21 **IT IS FURTHER ORDERED** granting Respondent's Motion to Strike (Doc. 15)
22 and striking the Sur-Reply at Doc. 14 as unauthorized by the Federal Rules of Civil
23 Procedure or the Local Rules of Practice for the District of Arizona, and not ordered by the
24 Court.

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28 ²The Court notes Petitioner does not object at all to the R&R's conclusions as to
Grounds Seven and Nine.

